United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

74-1262

United States Court of Appeals

FOR THE SECOND CIRCUIT

Bpls

Docket No. 74-1262

UNITED STATES OF AMERICA,

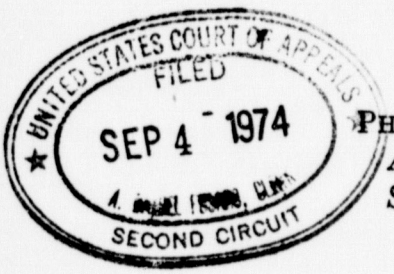
Appellee,

—against—

STEVEN CARDILE,

Defendant-Appellant.

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC BY STEVEN CARDILE AND MOTION IN THE ALTERNATIVE FOR A STAY OF MANDATE AND RELEASE ON BAIL PENDING CERTIORARI



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UNITED STATES OF AMERICA,

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To the Hon. Circuit Judges Moore, Friendly and Feinberg:

The defendant-appellant STEVEN CARDILE respectfully petitions this Court pursuant to its Rules and prays that it grant a rehearing in connection with the order and opinion of this Court rendered the 21st day of August, 1974 affirming the judgment of the United States District Court for the Southern District of New York which convicted Cardile of conspiracy to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21 United States Code and of unlawful distribution of a narcotic drug, cocaine, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) Title 21 United States Code, after trial before Carter D.J. and a jury.

In the event that this Bench denies a hearing or the present determination is adhered to the appellant respectfully requests that this Petition be submitted to all the active Circuit Judges for a determination en banc. The

importance of the issues herein involved transcend this particular case since they are vital questions concerning the Fifth and Sixth Amendments of the United States Constitution and of the supervisory powers of this Court.

A Brief Statement of the Underlying Facts

The dissenting opinion of Judge Friendly itself recognizes that this was a close case (Addendum p. 19) "These considerations are of special weight because the government's case rested almost entirely upon the testimony of Parton and both defendants offered plausible and partially corroborated explanations that their presence on the scene was innocent." and at page 5335 "This is the rare narcotic case where the defendants may be innocent."

The defendant Cardile was indicted with Floyd M. Parton and Theodore Frattini. Mr. Parton testified for the government at the trial. The government produced several witnesses who adduced the following testimony:

An undercover agent of the United States Department of Justice, Drug Enforcement Administration, Douglas L. Driver, had various contacts with Floyd M. Parton, starting approximately in August 1972. During the month of October 1972 Floyd M. Parton agreed to sell an amount of cocaine to agent Driver.

Mr. Parton stated that the defendant, Steven Cardile, had showed him a sample of cocaine at the place where he worked in October 1972. On October 17, 1972, agent Driver met Floyd M. Parton at the Cross County Diner. After a conversation about price, Mr. Parton called the home of Steven Cardile and spoke to Mr. Cardile and then Mr. Frattini. Mr. Parton then testified that Mr. Frattini came to

the diner and after having a conversation with Mr. Frattini in Mr. Frattini's car, he walked over to defendant Cardile, and then was handed by the defendant Cardile a package containing cocaine. He then received $1,700 from agent Driver and then went out to the car of Frattini and gave Mr. Frattini the $1,700.

It is interesting to note that none of the covering agents who testified saw the defendant Cardile at the diner parking lot that night. The co-defendant, Frattini, then drove an alleged circuitous route to Cardile's house where they had a brief conversation.

The co-defendant, Theodore Frattini, testified denying all allegations of the sale, and stated that Floyd had talked to him and appellant Cardile about money he owed to appellant Cardile, and that he gave him some money to pay to Cardile. The appellant, Steven Cardile, testified that he had loaned Floyd Parton, who he had previously known, $200 in April of 1972, and that he had made a note of this and recorded the payments on the loan on a piece of paper which he kept in a cash register drawer in his place of business. He testified that on October 17, 1972 he had received a call from Floyd at his home, which his wife answered, that he went to the diner to get the balance of the money from Floyd, and after Floyd called him, he went back home.

He had seen Frattini there and told Frattini that if Floyd gives you any money, drop it off at my house. He was accompanied in the car by his wife, Lucy Cardile, and a friend, Louis Mancuso, and both corroborated the defendant's testimony.

Melvin Kaufman, a partner of Mr. Cardile, also testified as to the slip of paper with notations of the loans which

was kept in the cash register drawer at their place of business. Kenneth Michael Zajac, a criminal investigator in the Westchester County Sheriff's Department, testified as a character-witness for the defendant Cardile.

Reasons for Granting Rehearing

The main question here was whether or not the Court below was correct in denying a continuance during the trial from 3:30 in the afternoon until the next morning. This was coupled with the Court's earlier refusal to grant a continuance prior to trial.

There was an unseemly rush to start this trial in view of the affidavit in support of the request for an adjournment prior to trial where defense counsel stated he was trying to locate two witnesses for the defense who resided out of state (see brief of defendant-appellant page 4-6 and additional appendix at page 12 of defendant-appellant's brief). The case was tried approximately one month after the arraignment with intervening Christmas and New Year holidays. In view of the above mentioned affidavit this seems an unseemly rush. The SECOND CIRCUIT COURT OF APPEALS Rules For Prompt Disposition of Criminal Cases was not promulgated to curtail defendant's right to counsel by forcing him to trial without giving him an opportunity to prepare, but to insure his right to a speedy trial and the public's right to prompt disposition of criminal cases. In the case here the forcing of the defendant to trial so quickly in view of the affidavit coupled with the refusal for the short continuance deprived the defendant to his right to counsel in the Sixth Amendment of the United States Constitution.

The majority in its opinion agreed that the offered testimony would not have been cumulative and that they might

have in the trial judge's place granted the adjournment brief as it was. Then the trial court cites *Ungar* v. *Sarafite*, 376 U.S. 575 (1964). However, in *Ungar* the Court specifically stated because it was dealing with a state court, held at page 591:

> "given the deference necessarily due for the trial judge in regard to the denial or granting of continuances, we cannot say these denials denied *Ungar* due process of law".

Here although I do not concede that the trial judge's conduct is not a deprivation of due process of law, we are also dealing with the supervisory powers of this Court over the District Courts. Judge Friendly in his dissent considered the denial so arbitrary that it would give rise to violations of due process.

The standard for Federal Courts as set in *United States* v. *Rosenthal*, 470 F.2d 837 at 844 (2nd Circ. 1972)

> "The decision whether to grant a continuance rests within the discretion of the District Judge, the sole requirement being that his decision be reasonable".

See also *United States* v. *Bentavena*, 319 F.2d 916 (2nd Cir.) There can be a ground where a Judge's decision may not be reasonable but at the same time may not be so arbitrary as to give rise to a violation of due process. The majority in its affirmance of this case cited *United States* v. *Wyler*, 487 F.170 (2nd Circ. 1973). In *Wyler* the defendant was trying his own case assisted by an attorney and the Court pointed out at page 174 that the attorney assisting Wyler said he did not believe that the witness requested by Wyler was necessary. Also in *Wyler* there was dissent by Judge Oaks. The *Wyler* case was similar in many respects to this case. There have been two strong

dissents by Judge Oaks and Judge Friendly which might leave the District Court Judges in a state of confusion without stringent guidelines as to when or when not to grant a continuance. Therefore, this might be a proper case for the whole Court to decide.

The majority stated that the offer of proof was not in enough detail and at this point I will again for the convenience of the Court set out the colloquy (transcript pages 471-473):

> "The Court: Who is this witness that is supposed to be coming from Atlanta? Why couldn't he get here before now?
>
> Mr. Christiansen: It was very difficult getting this witness and as I mentioned to the Court a month ago, I did have an investigator working down there and he could not come until tonight and I just never thought that we could finish the case.
>
> If we can just proceed to the hearing, he won't be very long. My direct won't be more than 20 minutes tomorrow morning.
>
> The Court: Are you going to have any rebuttal?
>
> Mr. Figueroa: I probably will have a very short rebuttal, your Honor. I don't think it will take over ten minutes.
>
> The Court: What is he going to testify to?
>
> Mr. Christiansen: Your Honor, it is a very material element of the case.
>
> The Court: Well, tell me what it is.
>
> Mr. Christiansen: He is going to testify to some conversation—
>
> The Court: You don't have to—
>
> Mr. Christiansen: Yes. He is going to have to testify about some conversation that he had with Floyd Parton subsequent to October—I mean Sep-

tember 18th, the time of his arrest, and that's what he is going to testify to, concerning this case.

The Court: I am not sure, if that is going to be his testimony, that it is going to be allowed. If that is what he is going to testify to, I'm not sure it is going to be allowed:

What do you want to do, Mr. Figueroa?

Mr. Figueroa: Your Honor, whatever the convenience of the Court dictates.

The Court: Do you want to wait until this testimony is on?

Mr. Figueroa: If that is what counsel intends to have this witness here for, I would object. We have had testimony to the same effect by other witnesses and I think I would object on the grounds that it is cumulative.

The Court: I think that is right. If that's what he is going to testify to, you have had testimony from you, you have had testimony from Mr. Mancuso, you have had testimony from Mr. Cardile. I don't see where that is going to be anything more than cumulative. All right, let us take the recess anyway."

I would like to point out to the Court that when Mr. Christiansen the trial counsel stated the witness is going to testify to some conversation the Court stopped him and said you do not have to. The "you don't have to" is cut off at that point. From the re-reading of the whole colloquy it is apparent that the Court was stating to the trial attorney that he does not have to give the conversation in detail. I also would like to point out to the Bench the atmosphere that this was done in. Earlier in the trial, trial counsel had asked to make an offer of proof which was denied by

the Court (trial transcript page 411-412). The Court had warned trial counsel that in questioning rulings he was close to being contemptuous. (Trial Transcript p. 46.)

The majority in its decision stated that although they may have granted the short continuance requested they would not overturn the Judge's decision. They then criticized trial counsel in that after the witness arrived from Atlanta he failed to interview the witness and submit an affidavit as to the witness' testimony as part of a motion for a new trial. Not all attorneys would think of this tactic. It seems the Court is holding the trial attorney to very high standards but holding the Judges of the District Court to a lower standard. The one to lose in this situation is neither the trial judges nor the attorneys but the defendants, especially in a case of this type where the factual pattern is so close and a jury could very easily find either way.

A motion for reargument should also be granted because of the Court's refusal to allow testimony as to the lifestyle and working habits of the appellant Cardile and his wife. There was evidence offered that the appellant owned his own home and two late model cars, one of which was an Eldorado. There was also testimony by Parton of some previous transactions with appellant. Trial counsel tried to show that appellant did not earn his money from narcotics but from long and hard hours by appellant and his wife. This point is also agreed with by Judge Friendly in his dissent.

If this conviction is not reversed you can have a result, if the co-defendant, Frattini, is acquitted on trial, his case having been reversed, which would result in a completely irrational finding for as Judge Friendly said (Addendum p. 19) "there was no evidence on which the jury could rationally find Frattini innocent and Cardile guilty." Therefore in the interest of justice this conviction must be reversed, so that the co-defendant's may be retried together.

Motion in the Alternative for Stay of Mandate and Bail Pending Certiorari

Even if this Court should deny the hearing and rehearing en banc; or if on rehearing it adheres to its original decision then it is submitted that the point on the arbitrariness of the denial of the continuance should be before the Supreme Court and it is an important issue that ought to be reviewed. The mandate therefore should be stayed. In addition, the defendant-appellant has no prior record and in fact was given a sentence of 3 years all but 6 months of which being suspended and the defendant was placed on special probation for a period of three years. This coupled to defendant's roots in the community including owning his own home and own business. It is therefore submitted that appellant should be admitted to bail pending certiorari. The issues are clearly not frivolous or meritless and if bail is denied by the time the Supreme Court acts on the Petition defendant may very well have served all of his 6 months.

A stay of mandate and bail, therefore, at least, should be granted.

Respectfully submitted,

Philip R. Edelbaum

PHILIP R. EDELBAUM

Attorney for Appellant-Defendant

Certification of Good Faith

I, PHILIP R. EDELBAUM, a member of the Bar of this Court, certifies that this Petition for rehearing and Motion in the Alternative for Stay of Mandate and Bail Pending Certiorari is submitted in good faith and not for the purpose of delay.

PHILIP R. EDELBAUM

Dated: September 4, 1974

ADDENDUM

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1086, 1087—September Term, 1973.

(Argued May 31, 1974 Decided August 21, 1974.)

Docket Nos. 74-1262, 74-1288

UNITED STATES OF AMERICA,

Appellee,

—against—

THEODORE FRATTINI and STEVEN CARDILE,

Defendants-Appellants.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeals from convictions, after jury trial, in the United States District Court for the Southern District of New York, Robert L. Carter, *J.*, of distributing and possessing (with intent to distribute) cocaine, and conspiring to do so.

Affirmed in part; reversed in part.

GILBERT EPSTEIN, New York, N.Y., *for Appellant Frattini.*

PHILIP R. EDELBAUM, White Plains, N.Y. (Edelbaum & Bodnar, on the brief), *for Appellant Cardile.*

NICHOLAS FIGUEROA, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York; S. Andrew Schaffer, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

Co-defendants Theodore Frattini and Steven Cardile appeal from convictions after a jury trial in the United States District Court for the Southern District of New York, Robert L. Carter, *J.*, on two counts of distributing and possessing (with intent to distribute) cocaine, and conspiring to do so. 21 U.S.C. §§ 812, 841(a) (1), 841(b) (1) (A), 846; 18 U.S.C. § 2. On February 14, 1974, the judge sentenced each defendant to a three year term of imprisonment on count 1, execution of which was suspended except for six months, and three years of probation on count 2. On appeal, defendants press various claims of error. For reasons stated below, we reverse Frattini's conviction but affirm as to Cardile.

I

The charges involved here stem from a government agent's purchase of 56.35 grams of cocaine from Floyd M. Parton, a co-defendant who pleaded guilty to one count prior to trial and testified for the Government against

appellants.[1] The prosecution's theory of the case—supported chiefly by testimony from the agent, Douglas Driver, and Parton—was that Parton functioned as middleman between appellants and the buyer, exchanging the drugs conveyed by the former for the purchase money ($1,700) provided by the latter. According to the Government's opening statement as well as Parton's evidence, Cardile was the one who actually supplied the drugs to Parton. Frattini participated in the transaction by negotiating with Parton and accepting the payment from him.

During the trial, the judge allowed into evidence—over Frattini's objection—Government Exhibit Nine, a chemist's report on the cocaine bought by Agent Driver. Aside from the chemical analysis, signed by the chemist, the document contained a notation above the signature of Agent Driver that the material submitted for testing was received by defendant Parton

> from one John Doe #1 (believed to be Theodore FRATTINI) who was parked in front of the Diner [where the sale took place] in a 1968 yellow Chrysler bearing N.Y. registration XT 1417.

On appeal, Frattini contends that this statement was inadmissible hearsay,[2] the introduction of which was erorr; we agree, and accordingly reverse his conviction.

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[1] On February 21, 1974, Parton was sentenced to two years probation.

[2] In his brief on appeal, Frattini alternatively argued that the report had never been received in evidence at all, yet was nonetheless improperly allowed to be brought into the jury room. At oral argument, appellate counsel conceded that this position was incorrect.

Addendum—Opinion of United States Court of Appeals

This case is governed by *United States* v. *Ware*, 247 F.2d 698 (7th Cir. 1957), which overturned a narcotics conviction because of the improper admission into evidence of envelopes bearing notes by government agents on the circumstances of the drug purchaser. Accord, *United States* v. *Brown*, 451 F.2d 1231 (5th Cir. 1971); *Sanchez* v. *United States*, 293 F.2d 260 (8th Cir. 1961). Cf. *United States* v. *Adams*, 385 F.2d 548 (2d Cir. 1967) (harmful comments never received in evidence). Although the bare chemist's report was admissible under the business records exception to the hearsay prohibition, *Ware*, supra, 247 F.2d at 699-700, the incriminating remarks of Agent Driver were not. Moreover, the erroneous receipt of these comments in evidence cannot be viewed as harmless since the proscutor stressed them in summation, and the jurors were allowed to examine the exhibit during their deliberations. *Ware*, *supra*, 247 F.2d at 700-01; *Brown*, supra, 451 F.2d at 1234; *Sanchez*, supra, 293 F.2d at 267, 269. See note 2 supra.

The Government, however, seeks to distinguish *Ware* in that there the hearsay declarations neatly condensed the whole case against the defendant, 247 F.2d at 700, while here the objectionable statement actually "muddie[d]" the prosecution's proof, given by Parton, that Cardile and not Frattini transmitted the drugs.[3] But appellee misconceives the essential thrust of this argument. In *Ware*, the fact that the challenged "memoranda were merely cumulative of other evidence properly in the record" was regarded as a *mitigating* factor. 247 F.2d at 700. In this case, however, the exhibit at issue contained evidence not theretofore admitted and not admissible at all because it was

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[3] Supplementary Brief for Appellee at 2 (submitted in letter form, in response to the panel's request at oral argument).

speculation by Agent Driver based upon what he had learned from some other source. In addition, the exhibit "switched theories" on Frattini in devastatingly harmful fashion. Until admission of the report, the jurors heard no testimony placing the cocaine in Frattini's possession. But after its receipt, they could have concluded that Frattini was directly linked to the sale. We cannot therefore say that this highly significant piece of evidence, specifically requested by the jurors for scrutiny in the jury room, did not affect their view of the case or influence them to defendant's detriment.

The Government also contends that the part of the report relating to the yellow Chrysler was "in fact admissible as an implied prior consistent statement of Parton after his testimony had been attacked as a recent fabrication . . . ."[4] According to appellee, the challenged statement tends to show that Parton had told the agent

> long before he had been arrested and had a motive to fabricate, that the occupant of the Chrysler was one of the people who supplied him with cocaine. Otherwise, the agent would not have recorded and checked out the ownership of the vehicle and come to the erroneous conclusion that Frattini had handed the drugs to Parton.[5]

Even ignoring the strained nature of the argument (which relies on supposed statements by Parton to Agent Driver to rehabilitate the former's testimony, attacked as the product of his post-arrest lies), we would in any event reject the claim because it does not go far enough. Whatever its merits with respect to the remarks about the

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[4] Supplementary Brief for Appellee at 2, supra note 3.

[5] Id. at 3.

Chrysler, the prior consistent statement rubric clearly fails to cover the vital preceding phrase identifying Parton's supplier as "one John Doe #1 (believed to be Theodore FRATTINI)" since, as we have already remarked, this comment was not consistent—but, on the contrary, was wholly at odds—with the Government's earlier proof via Parton as to the source of the drugs.

In the absence of any justification for admitting the challenged hearsay evidence, we reverse appellant Frattini's conviction and remand for further proceedings consistent with this opinion.[6]

II

We turn now to appellant Cardile. Although he does not urge this point, we have nonetheless considered whether our holding in co-defendant Frattini's case dictates a similar outcome here. Upon reflection, however, we do not believe that the hearsay error as to Frattini could have had any significant prejudicial "spillover" onto Cardile, which would call for reversal of the latter's conviction for the same evidentiary reason. We note that Cardile never objected below to the admission of Government Exhibit Nine. (Nor does he now in his brief on appeal except by a blanket adoption clause, incorporating "all of the points of argument . . . in the brief of the other appellant herein

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[6] In light of our disposition of this matter, we do not reach Frattini's second claim on appeal: that the court erred by failing to hold a hearing to determine whether one of the jurors was able to understand English. Cardile wisely does not make this argument since his counsel objected in the trial court to excusing the juror, on the grounds that "[h]e understood the questions that were put to him by [the court] and he gave answers to those questions . . . ."

insofar as applicable to his case.")[7] This failure to raise a claim is hardly surprising in view of the fact that the agent's hearsay comments if anything actually helped Cardile. Certainly, trial counsel thought so since, in his summation, in an effort to impeach the credibility of Parton, he dwelt on the discrepancy between the prosecution's theory of the case (that Cardile supplied the contraband) and the statement inculpating Frattini.

Cardile's principal claim on appeal is that the court improperly refused to grant a short continuance pending the arrival of the witness from Atlanta. Appellant requested an overnight adjournment for this purpose after the final defense witness had been heard. Trial counsel informed the court that the case was ending earlier than he had anticipated—hence the Atlanta witness's absence—but that the projected testimony would consume no more than 20 minutes on the next day. The judge denied the continuance, however, on the ground that the intended evidence would be merely cumulative.

The court was told that the Atlanta witness would "testify about some conversations that he had with Floyd Parton . . . September 18th, the time of his arrest. . . ." After a brief exchange between the judge and the Assistant United States Attorney, the former responded:

> If that's what he is going to testify to, you have had testimony from you [trial counsel], . . . from Mr. Mancuso, . . . from Mr. Cardile. I don't see where that is going to be anything more than cumulative.

Cardile argues on appeal that the proposed evidence was not, as the court thought, cumulative since it dealt with an earlier talk with Parton than the one already related

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[7] Brief for Cardile at 11.

by others.[8] We agree with this contention and—had we been in the trial judge's place—might well have decided to grant the adjournment, brief as it was. But "[t]he matter of continuance is traditionally within the discretion of the trial judge. . . ." *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). On this record, we cannot say that the failure to grant a continuance constituted an abuse of discretion. Trial counsel for Cardile never made an offer of proof as to the contents of the alleged "conversations." Nor did he—after the return of the verdict and the witness's presumed arrival from Atlanta—make a motion for a new trial, with an affidavit setting forth the testimony in detail. (At that point, having had the chance to interview the witness in person, he should have known the exact nature of the proffered evidence.) Given the vagueness of counsel's allusion to the witness's story, the judge acted within bounds in refusing appellant an adjournment. Cf. *United States* v. *Wyler*, 487 F.2d 170, 173-74 (2d Cir. 1973).

We have considered Cardile's other points on appeal[9] and find them to be without merit.

We therefore affirm the conviction of appellant Cardile.

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[8] Mancuso, Cardile and trial counsel Christiansen testified to a conversation that occurred on December 3, 1972.

[9] Cardile additionally complains of the court's alleged refusal to allow testimony as to his and his wife's life style and working habits (to rebut the inference that they lived on illicit profits from drugs) and of supposed violations of *Massiah* v. *United States*, 377 U.S. 201 (1964), in the admission of incriminating statements.

Addendum—Opinion of United States Court of Appeals

FRIENDLY, *Circuit Judge* (concurring and dissenting):

While I join in the reversal of Frattini's conviction, I would also reverse Cardile's.

I am unable to share my brother's belief that it is feasible to disentangle the two defendants. The Government's testimony linked them inextricably; there was no evidence on which the jury could rationally find Frattini innocent and Cardile guilty. Even though Exhibit 9 cast Frattini rather than Cardile in the role of the person making the actual delivery, it bolstered the Government's case that a narcotics transaction had taken place and weakened the testimony of both defendants that nothing of the sort had occurred. Beyond this, reversal of Cardile's conviction is necessary in justice not only to him but to Frattini. The Government's evidence at the new trial inevitably will include reference to Cardile, the jury will wonder why he is not a defendant, and if it speculates that he has been convicted, this will work against Frattini. Furthermore, Cardile's testimony was helpful to Frattini; it will be the opposite if he now takes the stand and the Government shows he has been convicted. These considerations are of special weight because the Government's case rested almost entirely on the testimony of Parton and both defendants offered plausible and partially corroborated explanations that their presence on the scene was innocent.

My belief that Cardile also should have a new trial is reinforced by what I consider an arbitrary denial of his counsel's request for a continuance from 3:30 P.M. until the following morning for the presentation of a witness from Atlanta and an erroneous refusal to permit Cardile to explain that his apparently easy life style was due to hard work by himself and his wife rather than to narcotics profits.

This is the rare narcotics case where the defendants may be innocent. There must be a new trial in any event, and it will take only a few hours longer if both defendants are included. Our duty is to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. I do not think it just to either Cardile or Frattini that the new trial should be truncated by our attempting to put asunder two defendants whom the Government's chief witness so tightly joined.